

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAWN PACHECO,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner
of Social Security Administration,
Defendant.

NO. 2:13-cv-03113-SAB

**ORDER GRANTING
PLAINTIFF'S MOTON FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 16, and Defendant's Motion for Summary Judgment, ECF No. 18. The motions were heard without oral argument. Plaintiff is represented by D. James Tree. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Leisa A. Wolf.

I. Jurisdiction

On June 3, 2010, Plaintiff filed a Title XVI application for supplemental security income (SSI). Plaintiff alleged she is disabled beginning January 1, 2001, due to arthritis, migraine headaches (with memory loss), PTSD, depression,

1 morbid obesity, water retention, sleep apnea and knee pain.¹

2 Her application was denied initially on February 7, 2011, and again denied
3 on reconsideration on April 20, 2011. A timely request for a hearing was made. On
4 May 10, 2012, Plaintiff appeared at a video hearing in Yakima, Washington before
5 Administrative Law Judge (ALJ) R.J. Payne. Dr. John R. Morse, medical expert,
6 and Dr. Margaret Ruth Moore, psychological medical expert, also participated.
7 Plaintiff was represented by attorney Chad Hatfield.

8 The ALJ issued a decision on June 18, 2012, finding that Plaintiff was not
9 disabled. Plaintiff timely requested review by the Appeals Council, which denied
10 her request for review on September 5, 2013. The Appeals Council's denial of
11 review makes the ALJ's decision the final decision of the Commissioner. 42
12 U.S.C. §405(h).

13 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern
14 District of Washington on October 16, 2013. The instant matter is before this
15 Court pursuant to 42 U.S.C. § 405(g).

16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death or which has lasted or
20 can be expected to last for a continuous period of not less than twelve months."
21 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
22 only if her impairments are of such severity that the claimant is not only unable to
23 do her previous work, but cannot, considering claimant's age, education and work
24 experiences, engage in any other substantial gainful work which exists in the
25 national economy. 42 U.S.C. §423(d)(2)(A).

26 ¹At the hearing, counsel agreed to amend the onset date to June 3, 2010. (Tr.
27 41.)
28

1 The Commissioner has established a five-step sequential evaluation process
2 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*
3 *Yuckert*, 482 U.S. 137, 140-42 (1987).

4 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
5 416.920(b). Substantial gainful activity is work done for pay and requires
6 compensation above the statutory minimum. 20 C.F.R. § 416.972(a); *Keyes v.*
7 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
8 substantial activity, benefits are denied. 20 C.F.R. § 416.971. If she is not, the ALJ
9 proceeds to step two.

10 Step 2: Does the claimant have a medically-severe impairment or
11 combination of impairments? 20 C.F.R. § 416.920(c). If the claimant does not
12 have a severe impairment or combination of impairments, the disability claim is
13 denied. A severe impairment is one that lasted or must be expected to last for at
14 least 12 months and must be proven through objective medical evidence. 20
15 C.F.R. § 416.909. If the impairment is severe, the evaluation proceeds to the third
16 step.

17 Step 3: Does the claimant's impairment meet or equal one of the listed
18 impairments acknowledged by the Commissioner to be so severe as to preclude
19 substantial gainful activity? 20 C.F.R. § 416.920(d); 20 C.F.R. § 404 Subpt. P.
20 App. 1. If the impairment meets or equals one of the listed impairments, the
21 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
22 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

23 Before considering Step 4, the ALJ must first determine the claimant's
24 residual functional capacity. 20 C.F.R. § 416.920(e). An individual's residual
25 functional capacity is her ability to do physical and mental work activities on a
26 sustained basis despite limitations from her impairments.

27 Step 4: Does the impairment prevent the claimant from performing work she
28 has performed in the past? 20 C.F.R. § 416.920(f). If the claimant is able to

1 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform
2 this work, the evaluation proceeds to the fifth and final step.

3 Step 5: Is the claimant able to perform other work in the national economy
4 in view of her age, education, and work experience? 20 C.F.R. § 416.920(g).

5 The initial burden of proof rests upon the claimant to establish a prima facie
6 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
7 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
8 mental impairment prevents her from engaging in her previous occupation. *Id.* At
9 step five, the burden shifts to the Commissioner to show that the claimant can
10 perform other substantial gainful activity. *Id.*

11 **III. Standard of Review**

12 The Commissioner's determination will be set aside only when the ALJ's
13 findings are based on legal error or are not supported by substantial evidence in
14 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
15 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
17 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
18 evidence is "such relevant evidence as a reasonable mind might accept as adequate
19 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
20 ALJ's denial of benefits if the evidence is susceptible to more than one rational
21 interpretation, one of which supports the decision of the administrative law judge.
22 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
23 support either outcome, the court may not substitute its judgment for that of the
24 ALJ." *Matney*, 981 F.2d at 1019.

25 A decision supported by substantial evidence will be set aside if the proper
26 legal standards were not applied in weighing the evidence and making the
27 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
28 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are

1 immaterial to the ultimate nondisability determination.” *Stout v. Comm’r, Soc. Sec.*
2 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

3 **IV. Statement of Facts**

4 The facts have been presented in the administrative transcript and the ALJ’s
5 decision and will only be summarized here.

6 At the time of the hearing, Plaintiff was 41 years old and living with her two
7 children and her ex-husband. Her children were ages 14 and 18. She has previous
8 work experience, but has not worked since 2004. Her previous employment
9 included working in retail and caregiver positions, as well as working in the fruit
10 industry as a sorter.

11 Plaintiff is morbidly obese. She testified that she spends the majority of her
12 day seated with her feet elevated, due to swelling of her lower extremities. She
13 also has knee pain. She can walk about 20 yards before she has to stop. She also
14 suffers from sleep apnea and uses a device to sleep.

15 Plaintiff reports that her children do the laundry and cleaning because she
16 cannot walk up and down stairs. She also has a friend come in to do housework.
17 She has suicidal thoughts on a daily basis. Plaintiff cooks occasionally. She reads
18 and does beadwork if she is not hurting too badly.

19 **V. The ALJ’s findings**

20 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
21 activity since June 3, 2010, the application date. (Tr. 23.)

22 At step two, the ALJ found Plaintiff has the following severe impairments:
23 morbid obesity, obstructive sleep apnea, bilateral osteoarthritis of the knees,
24 swelling of the lower extremities, and migraines. (Tr. 23.)

25 At step three, the ALJ found that Plaintiff’s impairments or combination of
26 impairments do not meet or medically equal Listing 1.00 (Musculoskeletal System
27 disorders); 3.00 (Respiratory System disorders); and 4.00 Cardiovascular System
28 disorders. (Tr. 23.)

1 The ALJ concluded that Plaintiff has the residual functional capacity to
 2 perform sedentary work as defined in 20 C.F.R. § 416.967(a) ¹ except occasionally
 3 climb, balance, stoop, kneel, crouch and crawl; avoid concentrated exposure of
 4 noise, vibration, fumes, odors, dusts, gases, poor ventilation, and hazardous
 5 machinery and heights. (Tr. 26.)

6 At step four, the ALJ found Plaintiff was not capable of performing any past
 7 relevant work. (Tr. 30.)

8 At step five, the ALJ found there were jobs that exist in significant numbers
 9 in the national economy that Plaintiff can perform. (Tr. 32.) The ALJ relied on the
 10 Medical-Vocational Guidelines and found that the additional limitations have little
 11 or no effect on the occupational base of unskilled sedentary work. As a result, the
 12 ALJ concluded that Plaintiff has not been under a disability, as defined in the
 13 Social Security Act, since June 3, 2010.

14 **VI. Issues for Review**

15 1. Did the ALJ commit reversible error for failing to consider the
 16 combined impact of all of Plaintiff's impairments in the RFC assessment?

17 2. Did the ALJ commit reversible error by improperly rejecting the
 18 opinions of Plaintiff's treating medical providers?

19 3. Did the ALJ commit reversible error by improperly rejecting
 20 Plaintiff's subjective complaints?

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 22 _____
 23 ¹ (a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a
 24 time and occasionally lifting or carrying articles like docket files, ledgers, and
 25 small tools. Although a sedentary job is defined as one which involves sitting, a
 26 certain amount of walking and standing is often necessary in carrying out job
 27 duties. Jobs are sedentary if walking and standing are required occasionally and
 28 other sedentary criteria are met.

1 4. Did the ALJ commit reversible error by improperly applying the grids
2 without soliciting the testimony of a vocational expert?

3 **VII. Discussion**

4 **1. RFC Assessment**

5 Plaintiff argues the ALJ committed reversible error for failing to consider
6 the combined impact of all of her impairments in the RFC assessment.
7 Specifically, Plaintiff contends the ALJ failed to consider the functional
8 limitations caused by her non-severe major depressive disorder and anxiety.
9 According to Dr. Kester, who examined Plaintiff, Plaintiff is moderately limited in
10 the following abilities: to carry out detailed instructions; to maintain attention and
11 concentration for extended periods; to perform activities within a schedule; to
12 maintain regular attendance and be punctual within customary tolerances; to work
13 in coordination with or proximity to others without being distracted by them; to
14 complete a normal workday and workweek without interruptions from
15 psychologically-based symptoms and to perform at a consistent pace without an
16 unreasonable number and length of rest periods; to interact appropriately with the
17 general public; to accept instructions and respond appropriately to criticism from
18 supervisors; and to get along with coworkers or peers without distracting them or
19 exhibiting behavior extremes. (Tr. 437-439.) Dr. Kester concluded that Plaintiff
20 would work best with superficial public and co-worker contact. Additionally,
21 letters from family and friends indicate that Plaintiff avoids being around people
22 and she stopped going to church to avoid people. (Tr. 271-275.) They also
23 describe her debilitating headaches. *Id.*

24 The ALJ's residual functional capacity assessment did not include these
25 non-exertional limitations. Pursuant to 20 C.F.R. § 945(e), the ALJ is required to
26 consider the total limiting effects of Plaintiff's impairment in determining the
27 residual functional capacity:
28

(e) Total limiting effects. When you have a severe impairment(s), but your symptoms, signs, and laboratory findings do not meet or equal those of a listed impairment in appendix 1 of subpart P of part 404 of this chapter, we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of your impairment(s) and any related symptoms, we will consider all of the medical and nonmedical evidence, including the information described in § 416.929(c).

The ALJ committed clear error in failing to incorporate Dr. Kester's non-exertional limitations in determining Plaintiff's residual functional capacity. As such, remand is required for further consideration.

2. Medical Opinions

The ALJ is tasked with resolving conflicts in the medical evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Here, the ALJ gave greater weight to the opinions of the non-treating physicians, and gave little weight to Plaintiff's treating physician's opinion. Plaintiff argues the ALJ improperly rejected the opinions of her treating medical providers: (1) Dr. Sabry and (2) ARNP Liu.

Dr. Sabry issued three opinions regarding Plaintiff's ability to work: (1) May 27, 2010, Tr. 476-77; (2) February 3, 2011, Tr. 473-474; and (3) August 8, 2011, Tr. 465-66. In each opinion, he concluded that Plaintiff was limited to sedentary work on a part-time basis. ARNP Liu opined that Plaintiff would need to lie down throughout the day due to migraine headaches and bilateral knee pain, and that she would miss work due to her medical impairments, especially the

1 uncontrolled migraine headaches. (Tr. 594.)

2 Generally speaking, three types of doctors provide medical evidence:
3 treating doctors, examining doctors, and reviewing (non-examining) doctors. “By
4 rule the Social Security Administration favors the opinion of a treating physician
5 over non-treating physicians.” 20 C.F.R. § 416.927²; *Orn v. Astrue*, 495 F.3d 625,
6 631 (9th Cir. 2007). “If a treating physician’s opinion is well-supported by
7 medically acceptable clinical and laboratory diagnostic techniques and is not
8 inconsistent with the other substantial evidence in the case record, it will be given
9 controlling weight.” *Orn*, 495 F.3d at 631. If a treating physician’s opinion is not
10 given “controlling weight” because it does not meet these requirements, the ALJ
11 should consider (i) the length of the treatment relationship and the frequency of
12 examination by the treating physician; and (ii) the nature and extent of the
13 treatment relationship between the patient and the treating physician in
14 determining the weight it will be given. *Id.* The ALJ is not required, however, to
15 merely accept the opinion of a treating doctor. *Lester v. Chater*, 81 F.3d 821, 830
16 (9th Cir. 1995). Where contradicted, the ALJ may reject the opinion for specific
17 and legitimate reasons that are supported by substantial evidence in the record. *Id.*
18 On the other hand, where the treating doctor’s opinion is uncontradicted, the ALJ
19 can only reject it for clear and convincing reasons. *Id.*

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22 ² 20 C.F.R. § 416.927(c)(2) states: Generally, we give more weight to opinions
23 from your treating sources, since these sources are likely to be the medical
24 professionals most able to provide a detailed, longitudinal picture of your medical
25 impairment(s) and may bring a unique perspective to the medical evidence that
26 cannot be obtained from the objective medical findings alone or from reports of
27 individual examinations, such as consultative examinations or brief
28 hospitalizations.

1 The opinions of examining physicians are afforded more weight than those
2 of non-examining physicians. *Id.* Factors the ALJ should consider in evaluating
3 any medical opinion (not limited to the opinion of the treating physician) include:
4 (1) the amount of relevant evidence that supports the opinion and the quality of the
5 explanation provided; (2) the consistency of the medical opinion with the record
6 as a whole; (3) the specialty of the physician providing the opinion; and (4) other
7 factors, such as the degree of understanding a physician has of the
8 Administration's disability programs and their evidentiary requirements and the
9 degree of his or her familiarity with other information in the case record. *Orn*, 495
10 F.3d at 631.

11 Here, the ALJ gave great weight to a non-examining physician, and gave
12 little weight to the treating physician's opinion. This was in error. Dr. Sabry
13 treated Plaintiff for over two years before the May 2010 opinion was given. At no
14 time was there any indication that Dr. Sabry concluded that Plaintiff's subjective
15 complaints were unreliable. Rather, the objective medical evidence supports that
16 Plaintiff suffers from uncontrollable headaches. The ALJ failed to give sufficiently
17 specific reasons for rejecting Dr. Sabry's opinion and ARNP Liu's opinion. The
18 ALJ discredited ARNP Liu's opinion for failing to indicate how many days on
19 average she would miss, yet gave Dr. Morse's opinion, who is a non-examining
20 medical source, great weight even though Dr. Morse refused to quantify the
21 number of days she would miss. The Court agrees with Plaintiff that the "ALJ
22 cannot reject the opinion of a treating medical provider for failing to quantify a
23 limitation and then accord great weight to a reviewing medical source who refused
24 to when questioned about the *reasonableness* of a particular quantification." ECF
25 No. 16 at 19 (emphasis in original).

26 Additionally, the ALJ committed reversible error when he improperly relied
27 upon the opinion of a non-examining physician to reject the opinion of Plaintiff's
28 treating physicians. *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1995) ("The

1 opinion of a nonexamining physician cannot by itself constitute substantial
2 evidence that justifies the rejection of the opinion of either an examining physician
3 or a treating physician.”). As such, remand is warranted.

4 **3. Plaintiff’s Credibility**

5 The ALJ found that Plaintiff’s statements concerning her limitations were
6 not credible. He concluded that the objective medical did not support the claimed
7 level of limitations.

8 An ALJ’s assessment of a claimant’s credibility is entitled to “great weight.”
9 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
10 evidence of malingering, the ALJ must give “specific, clear and convincing
11 reasons” for rejecting a claimant’s subjective symptom testimony. *Molina v.*
12 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ’s
13 credibility finding is supported by substantial evidence in the record, the
14 reviewing court “may not engage in second-guessing.” *Thomas v. Barnhart*, 278
15 F.3d 947, 959 (9th Cir. 2002).

16 In recognition of the fact that an individual’s symptoms can sometimes
17 suggest a greater level of severity of impairment than can be shown by the
18 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
19 the kinds of evidence, including the factors below, that the ALJ must consider in
20 addition to the objective medical evidence when assessing the credibility of an
21 individual’s statements:

- 22 1. The individual’s daily activities; 2. The location, duration,
frequency, and intensity of the individual’s pain or other symptoms;
- 23 3. Factors that precipitate and aggravate the symptoms; 4. The type,
dosage, effectiveness, and side effects of any medication the
- 24 individual takes or has taken to alleviate pain or other symptoms; 5.
Treatment, other than medication, the individual receives or has
- 25 received for relief of pain or other symptoms; 6. Any measures other
than treatment the individual uses or has used to relieve pain or other
- 26 symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
minutes every hour, or sleeping on a board); and 7. Any other factors
- 27
- 28

1 concerning the individual's functional limitations and restrictions due
2 to pain or other symptoms.

3 SSR 96-7P, 1996 WL 374186.

4 The ALJ concluded that the record reflected relatively infrequent trips to the
5 doctor for her disabling headaches. He suggested that Plaintiff only complained of
6 headaches ten times between April 28, 2008 and April 1, 2011. As Plaintiff points
7 out, this is not an accurate representation of the record. Instead, the record reflects
8 at least fifteen appointments where Plaintiff primarily complained about
9 headaches/migraines and twenty-one appointments where headaches/migraines
10 were provided as a diagnosis. There is nothing in the record to indicate that her
11 treatment providers believe that Plaintiff was malingering or drug seeking.

12 The ALJ failed to state specifically which symptom testimony was not credible
13 and what facts in the record undermined her testimony. There is nothing in the
14 record that suggests that Plaintiff's activity level is inconsistent with her
15 testimony, or that her reported activity level is reflective of a person who is not
16 disabled.

17 As such, the ALJ's credibility determination is not supported by substantial
18 evidence in the record.

19 **4. Vocational Expert**

20 Plaintiff argues the ALJ erred in not consulting a vocational expert. The
21 Court agrees. The record demonstrates that Plaintiff has significant non-exertional
22 limitations. As such, the ALJ was required to consult a vocational expert, and not
23 just rely on the grids. *See Tackett v. Apfel*, 180 F.3d 1094, 1101-02 (9th Cir. 1999).

24 **VIII. Conclusion**

25 The ALJ committed reversible error in failing to consider all of Plaintiff's
26 impairments in determining her residual functional capacity, giving little weight to
27 Plaintiff's treating and great weight to the non-examining medical source, and
28 finding Plaintiff not credible. Plaintiff has requested that the Court remand the

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 12**

1 case to the Agency for an award of benefits. While the Court has the authority to
2 do so, this case does not merit this relief. A proper Residual Functional Capacity
3 must be determined and a vocational expert must be consulted to determine
4 whether Plaintiff is disabled as defined by the Social Security Act.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, ECF No. 16, is **GRANTED**.

7 2. Defendant's Motion for Summary Judgment, ECF No. 18, is **DENIED**.

8 3. The decision of the Commissioner denying benefits is **reversed** and
9 **remanded** to the agency for further proceedings consistent with this Order.

10 4. The District Court Executive is directed to enter judgment in favor of
11 Plaintiff and against Defendant.

12 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
13 file this Order and provide copies to counsel.

14 **DATED** this 10th day of September, 2014.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

21 Stanley A. Bastian
22 United States District Judge
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